Journal of Comparative Business and Capital Market Law 8 (1986) 249–279
North-Holland

INTERNATIONALIZATION OF SECURITIES MARKETS: A CRITICAL SURVEY OF U.S. AND EEC DISCLOSURE REQUIREMENTS

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This Article examines the disclosure systems in the EEC and the U.S. considering the trend towards internationalization of capital markets. The Article suggests that present U.S. requirements for foreign issuers do not adequately address the similarities of the two disclosure regimes. The Article discusses the recent proposal of the SEC to facilitate multinational security offerings in light of these considerations and suggests that the proposal provides an opportunity to make U.S. requirements more reflective of the internationalization trend.

1. Introduction

The internationalization of the world's capital markets is a logical extension of the free flow of goods and services across national borders. Removal of obstacles to the free flow of capital may result in a more efficient allocation of resources by increasing the width and liquidity of existing securities markets and by providing the opportunity for both improved corporate and investment planning [1]. The process, however, is not an unencumbered one. As in the area of trade, there are incentives for removing barriers to internationalization while, at the same time, there are protectionist tendencies at play in each national arena [2].

In the United States, as elsewhere, a two-pronged problem confronts regulators. They must attempt to secure sufficient information to assure reasoned investment decisions [3]. Simultaneously, they must try not to structure an overly restrictive regulatory environment [4]. Such an environment would inhibit entry by foreign issuers, thus limiting opportunities for U.S. investors [5].

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This Article is dedicated to Eugene G. Merloe for his intellectual inspiration and his global perspective. The author would also like to express his appreciation to Noyes E. Leech for his encouragement and to Robert H. Mundheim, Edward F. Greene, and Carl T. Bodolus for their comments. The author, of course, takes full responsibility for any errors that appear in the text.
This Article was written while the author was a student at the University of Pennsylvania Law School.

0167-9333/86/$3.50

In order to enhance its functioning, the European Economic Community (EEC) has opted to harmonize member states' approaches to disclosure of corporate financial information [6]. Such developments are favorable to the internationalization of the world's capital markets. Although the EEC requirements are similar to the U.S. disclosure requirements for foreign issuers [7], the regulatory regime in the U.S. has not made allowances for the remaining differences between disclosure schemes. This restricts entry into the U.S. domestic market for EEC issuers [8].

Such restricted entry narrows investment choices on the U.S. domestic market. Investors are free to invest in foreign markets, but transaction costs are thereby increased [9]. Additionally, U.S. antifraud remedies may be foreclosed to such transactions. Finally, market research is less readily available for the investment decision-making of U.S. individuals concluding transactions in overseas markets. Although these added burdens may not be overriding factors for institutional investors, they may prevent individuals from entering foreign markets. The net result is a constricted flow of capital that is disadvantageous to U.S. investors and foreign issuers.

This Article suggests that the U.S. requirements unnecessarily inhibit entry into U.S. securities markets by EEC issuers, given the degree of similarity between the U.S. and EEC regulatory regimes. This is particularly true for world-class issuers [10] from EEC member states whose securities are regularly followed by the U.S. investment community.

This Article first presents an overview of the internationalization of securities markets, drawing attention to the EEC and to the United States. The overview is followed by an evaluation of the EEC disclosure system. The purpose of this Section is to consider the various aspects of the system and to determine whether the implementation of the system by member states warrants a unified approach by U.S. regulators to issuers from EEC countries. The U.S. requirements for foreign issuers will then be analyzed while considering whether they are presently too restrictive toward issuers from the European Community. The final section will draw conclusions from the preceding analysis and pose questions about the implications for other foreign issuers' entry into the U.S. securities market.

2. Scope of Developments in International Markets

2.1. Overview

The internationalization of the world's capital markets is a rapidly developing phenomenon [11]. Present technology permits the transmission of orders, payments, and securities from one point to another almost instantaneously. National boundaries present no barriers to the technology, but national regulations, corporate marketing strategies, and investor preferences can present barriers to the transnational flow of capital [12]. While markets are still some distance from a well-integrated global system, developments in the last dozen years have brought the possibility closer [13]. Forty-seven countries conduct trading on equities markets [14], and within each jurisdiction there may be several markets [15]. The United States is responsible for approximately half of the worldwide market assets; however, the 1980 figures for several other leading markets illustrate the importance of foreign stock exchange assets [16]. Much of the international capital market is unregulated, and where regulation exists it may follow widely different models: the French markets are regulated by an national agency similar to the U.S. Securities and Exchange Commission (SEC); in Canada, the provinces carry the main regulatory responsibility; Japan does not use an agency but regulates directly through the Ministry of Finance; in the United Kingdom, the stock exchange self-regulates; and in West Germany, the banks play a large self-regulatory role [17].

Internationalization of securities markets occurs when investors and corporate entities take the initiative to cross national boundaries. Corporate-initiated internationalization takes two principal forms. Corporations issue their securities in the primary markets of countries other than their principal places of business. For example, primary market use by foreign first-time issuers totaled £106.9 billion on the London Exchange between 1981 and early 1984 [18]. There were twenty-six new foreign issuers listed on that exchange between January and May of 1984 alone [19]. Corporations also use foreign secondary markets by listing the same class of securities for trading simultaneously on exchanges in more than one country. The ninety-one stocks listed simultaneously on the London and New York exchanges illustrate foreign issuer use of secondary markets [20].

2.2. *Reasons Supporting Internationalization*

Several important factors foster internationalization of the world's securities markets. The potential for superior investment opportunities spurs greater investor interest in the markets of other countries [21]. Moreover, advanced technology in communications not only facilitates the mechanisms of transaction, but also provides access to financial researchers and analysts in other countries.

Investment opportunities abroad allow U.S. investors to obtain higher rates of return than may be gained from domestically issued securities. While the economic conditions of the last decade which helped many foreign markets to produce higher yields than the domestic market may not recur in the 1980s, anticipation of such yields helps determine investor behavior [22]. In addition to the possibility of higher returns, foreign securities offer a wider investment choice. This in turn provides an opportunity for enhanced portfolio diversification. By mixing domestic holdings with investments from countries with different economic performances and currency patterns, risks associated with changes in the stock index of a single country can be offset [23].

Factors favorable to the corporate entity also support internationalization. Entering foreign markets broadens a corporation's ownership base, which provides stability and an additional pool of assets. Foreign issues can generate foreign currency to be used in the local operations of multinational enterprises, which may then reduce foreign exchange and tax problems. Entry into the Eurodollar market, for example, may provide cheaper borrowing rates for U.S. corporations [24]. In addition, certain capital markets may attract a corporate issuer because that market has a noted interest in its type of business [25]. Also, an established presence in foreign capital markets makes acquisitions of foreign corporate entities cheaper and easier [26].

2.3. Barriers to Internationalization

Noteworthy obstacles remain which impede the internationalization of capital markets. Protectionist barriers to the free flow of capital take direct forms, sometimes in the guise of taxes and currency exchange controls on the transnational flow of capital [27]. Some nations prohibit foreign investment in certain industries [28]. Additional direct restrictions take the form of regulations on listing securities and on stock exchange membership. Regulation of interest rates and taxes on interest or dividend income received by foreign investors provide examples of indirect impediments to the internationalization process [29].

National characteristics can have restrictive effects in several ways. While language differences do not create insurmountable obstacles either to executing securities transactions or to obtaining analysis of financial information, they do, however, consume both time and expense. More formidable barriers arise from cultural or historic differences among national approaches to business financing. Disclosure, accounting, auditing, trading, and enforcement are all affected by such differences [30]. Comparability of financial information is critical to informed investment decisionmaking; yet, there is no internationally uniform approach to accounting standards [31]. National differences concerning the types and amounts of information that must be publicly disclosed also serve to inhibit the internationalization of capital markets [32].

2.4. World Securities Markets

2.4.1. European Economic Community

While Europe is certainly not unique in manifesting historical characteristics that affect interactions between capital markets, it provides clear illustrations of factors widely variant from the U.S. experience. Until the post-World War II era, most corporate entities in continental Europe were either family-owned or closely held companies [33]. Publicly held corporations, with shareholders requiring information obtained by mandated disclosure, played a minor role in most national economies [34]. As a consequence, laws affecting companies were largely silent on securities regulation [35]. Corporations relied upon debt rather than equity financing, and traditionally they relied upon banks to meet these needs [36].

In contrast to the U.S. system, banks provided a universal function in much of continental Europe by executing most securities transactions [37]. Generally, transactions were concluded at the initiative of the customer, who had already made the investment decision based upon previously obtained information [38]. The role of institutional investors in many West European countries has also traditionally been small compared to that in the United States [39]. State-provided medical and retirement programs in these countries, along with periodically severe inflation, have served to reduce the role of insurance companies and private pension funds in aggregating individual savings for use in capital markets [40]. In France, for example, individuals have historically preferred to place their investments in land and gold rather than in securities [41]. In West Germany, approximately two percent of the private wealth was invested in gold coins in 1980, contributing to the lack of liquidity of German capital markets [42].

The 1957 Treaty Establishing the European Economic Community (Treaty of Rome) [43] proclaimed the abolition of obstacles to the free flow of persons, services, and capital as one of the European Community's basic principles [44]. Articles 52 through 58 of the Treaty of Rome address this principle in relation to the establishment of enterprises in member states other than an individual's or company's home country. At the same time, Articles 67 through 73 address removing restrictions on the free flow of capital between member states. In full recognition of the historical differences in the economic functionings between the member states, the Treaty of Rome provided for a transition period of between twelve and fifteen years in establishing the EEC [45].

Even though almost twenty-nine years have passed since the Treaty of Rome was signed, significant differences in the economic functioning of the member states are still in the process of being addressed [46]. Among those differences are a number of concerns of import to the internationalization of capital markets. Through a series of directives on company law, the EEC is taking steps to harmonize disclosure requirements, accounting and auditing principles, and methods of corporate governance [47]. The combined effect of the directives brings the reporting regime of the EEC very close to that required of foreign corporations operating in the United States. This, in turn, provides a basis for opening the U.S. market to enhanced foreign participation.

2.4.2. United States

Traditionally, the U.S. securities market has maintained a strong domestic orientation [48]. Commentators on the boundary drawn around U.S. markets by the tax and securities laws sometimes accuse the U.S. of adopting a "regulatory fence" [49] or a "fortress America" [50] approach. While restrictions on the outward flow of capital occasionally draw attention [51], barriers to entry into U.S. markets posed by the Securities Act of 1933 (1933 Act) [52] and the Securities Exchange Act of 1934 (1934 Act) [53] provide the usual focus for discussion.

The 1933 Act and the 1934 Act apply without distinguishing between foreign and domestic issuers [54]. A foreign issuer's entry into the domestic market to sell securities or to register on a stock exchange constitutes a voluntary act triggering the regulatory scheme. Consistent with this concept of voluntarism, the SEC provides exemptions for certain foreign companies quoted in the over-the-counter market, since such quotation can be effected without any affirmative actions by the issuer [55]. By failing to provide allowances for differences in national reporting systems, however, the regulatory scheme results in restricting foreign participation in the U.S. securities market [56].

Major disincentives to foreign issuers' entry into U.S. securities markets include the high costs of management resources and administrative efforts associated with meeting U.S. disclosure requirements, which could be avoided in large part if the United States accepted foreign formats for presenting information disclosed in home markets [57]. Another noted repellent to interested foreign issuers is the required disclosure of data that may be valuable to home-country competitors [58]. While the exact amount of foreign participation lost to the U.S. market resulting from these disincentives cannot be precisely ascertained, a rough idea of its dimensions may be gleaned from facts available concerning international issuings. Consider, for example, that between 1979 and 1981 the total amount of equity and convertible debentures sold by non-U.S. companies of foreign origin in Europe included 109 offerings worth $4.55 billion, while during the same period in the United States there were only nineteen foreign offerings worth $790 million [59]. Between 1979 and 1981, Japanese companies issued approximately $14 billion in overseas securities, only $544 million of which were issued in the United States [60]. No calculations are required to deduce that a significant portion of such offerings might have been released in the United States if foreign issuers received a higher degree of accommodation by U.S. regulations.

The SEC effected significant reporting changes in the last eight years aimed in part at addressing the distinctive features of foreign issuers. The first such change came with the institution of Form 20-F for registration and reporting under the 1934 Act [61]. Requiring use of Form 20-F by non-North American issuers marked an attempt to accommodate U.S. disclosure requirements to the requirements of other countries and international organizations [62]. The requirements of Form 20-F, in fact, approximated disclosure standards set forth in the EEC's Sixth Directive on company law, the "Information Directive" [63]. Form 20-F did not, however, address the 1933 Act requirements. As the SEC moved its system into place for integrating the 1933 Act and 1934 Act disclosure requirements [64], it first asked for comment upon [65] and then instituted a foreign issuers' integrated disclosure system [66].

The foreign issuers' integrated disclosure system, as adopted, allowed foreign issuers to make use of short-form registration statements incorporating information reported on Form 20-F by reference to that form. This placed foreign issuers on a par with domestic issuers in certain respects, but disclosure requirements for the 1933 Act purposes were not relaxed to account for the distinctive position of foreign companies [67]. Although commentators generally regarded the SEC's move as a step in a positive direction [68], the system elicited mixed reactions. Some viewed it as a modest step [69], while others felt the requirements were too accommodating [70]. Most commentators did agree, however, that the foreign integrated disclosure system would not result in a significant increase in foreign companies making public offerings in the domestic market because of the system's failure to liberalize the 1933 Act requirements [71].

In another step aimed at removing special treatment of foreign issuers, the SEC eliminated a major 1934 Act reporting exemption for foreign securities initially quoted on the National Association of Securities Dealers' Automated Quotation System (NASDAQ) after October 5, 1983 [72]. While the SEC's action refrained from requiring previously exempted non-North American companies to file annual submissions on Form 20-F, it marked a partial departure from the SEC's former-position of not requiring registration by foreign issuers with securities quoted in over-the-counter markets. This action placed requirements on NASDAQ quotation which approximated those for foreign issuers listed on a stock exchange in the United States [73]. The results of eliminating this exemption may inhibit foreign companies from entering this element of the U.S. capital markets.

Following the October 1983 changes relating to NASDAQ listing, no major public initiatives in the foreign issuer disclosure area were considered by the SEC until February, 1985 [74]. On February 28, 1985, however, the SEC announced a new effort towards internationalization of the public offering process [75]. Noting the importance of the trend towards internationalizing world capital markets, the SEC asked for public comment on two possible approaches to facilitate simultaneous multinational securities offerings [76].

The major motivation for the SEC's interest was the possibility of a common approach between the United States, Canada, and the United Kingdom. The SEC sought additional suggestions for aiding multinational offerings and left the door open for suggestions on how to involve more countries in the process. The public comment period, which extended until July 15, 1985, and the evaluation period following it provided an opportunity for the SEC to develop a new avenue for encouraging foreign entry into the U.S. securities market. The inclusion of the United Kingdom in the SEC's initiative enhanced the timeliness of exploring the relationship between the United States and the EEC's disclosure requirements.

To draw conclusions about the scope of the SEC's actions in relation to foreign issuers, particularly from EEC countries, it is necessary first to examine more closely each of the regulatory schemes.

3. Securities Regulation in the EEC System

Capital market integration in the EEC flows largely from a series of EEC directives geared at harmonizing the securities regulations of member states. In order to evaluate this stream of EEC actions, stretching back to 1968, a basic familiarity with the nature and effect of an EEC directive is required.

In the EEC system, a directive binds each member state with regard to the particular result it aims to achieve [77]. At the same time, the national authorities retain the choice of forms and methods to employ in achieving that result [78]. Directives are thereby automatically incorporated into the domestic legal system, although it remains for national authorities to implement them [79]. This procedure makes it necessary to follow a directive into a particular state or states to determine if it has been adopted, as well as to determine if it has been successfully implemented.

Eleven directives and four proposed directives relate to the securities markets in EEC countries [80]. A table of these items appears at the end of this Article as Appendix A. The directives most relevant to a comparison with U.S. disclosure requirements for foreign securities [81] may be grouped into three loosely developed categories: basic disclosure requirements for company formation, exchange listing, and periodic reporting; requirements related to accounting principles and auditing standards for financial statements; and requirements related to disclosure of information to company employees.

3.1. Basic Disclosure Requirements for Company Formation, Exchange Listing, and Periodic Reporting

The First Directive [82] addresses disclosure of financial information [83], validity of obligations entered into by the company [84], and conditions which render the formation of the company null and void [85]. At the outset, the Directive sets forth the types of companies to which it applies, country by country [86]. The disclosure section details the information to be made publicly available. This includes the basic documents of incorporation, the company's structure and administration, a yearly account of capital subscribed, the balance sheet, a yearly profit and loss account, and other facts relevant to the company's financial health [87]. The Directive also requires member states to set up a registry system to receive the disclosure material, to make "true copies" available to any third party at cost, to publish the material in a national financial gazette, and to assure that there are no discrepancies between the filed and published materials [88].

All EEC countries except Greece, Spain, and Portugal have adopted the First Directive into their national requirements [89]. Greece entered the EEC in 1981 without a transition period. As a result, the EEC has created an interim period by permitting non-compliance with EEC decrees for an undetermined time [90]. Spain and Portugal entered the EEC in 1986 and are presently in a transition period for implementing a number of EEC directives [91].

In the United Kingdom there are serious problems with implementing the First Directive because as many as forty percent of the companies fail to file annual accounts [92]. In response to EEC pressure, the United Kingdom is moving to improve its administration [93]. Implementation problems also exist in Germany, where disclosures are deposited in more than 300 separate locations [94]. Under this system, the difficulty in determining which depository holds the information precludes many third parties from obtaining it. Italy, in response to problems similar to Germany's, is beginning to computerize filings [95], and Belgium's system of decentralized filing with centralized deposit of annual accounts is being used as a model by other countries [96].

While several significant problems linger in the implementation schemes for the First Directive, the required disclosure under the Directive presents a considerable body of information, readily available to the public through both publication and the registries. The requirements of the First Directive make a good contribution to the overall pool of public information disclosed as a result of the directive series.

Three unnumbered directives relating to shares listed on official stock exchanges, and a proposed directive on disclosure requirements for unlisted securities offered to the public are extremely important to the EEC's disclosure system. The Council Directive of March 5, 1979, Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing is referred to as the "Listing Directive" [97]. The Listing Directive sets out detailed schedules of conditions for admission to listing and obligations of issuers once listed [98]. The Directive is comprised of two major parts. The first part establishes the minimum requirements to be met before listing, which approximate requirements posed by the SEC for securities qualified for trading on a national market system [99]. The second establishes the continuing obligations of issuers of listed securities, which approximate requirements of the SEC's Forms 10-K and 20-F [100]. This Directive also provides for designation of competent authorities by member states [101] and for sanctions [102]. However, it also requires that continuing disclosures called for in the schedules of obligations for listed issuers be published in a newspaper of the listing state [103]. Also, the Directive provides a cooperation mechanism to facilitate simultaneous listings in more than one member state [104].

The related Council Directive of March 17, 1980 (Information Directive) [105], formerly referred to as the Sixth Directive, also plays a significant role within the disclosure system [106]. The Information Directive seeks disclosure of all the information needed for sound investor decisionmaking concerning a regulated security. Its success may be illustrated by noting that U.S. commentators hail it as roughly equivalent to the U.S. SEC Form 20-F's disclosure requirements [107].

Also of import to the EEC's disclosure regime is the Council Directive of February 15, 1982 [108], requiring "half-yearly reports" for issuers of securities listed on an official stock exchange. The report is to be in two parts: one part is to set forth figures on net turnover, profits and losses, interim dividends when applicable, and figures for the previous fiscal year corresponding to each included item; the second part consists of an explanatory statement to provide investors with the requisite intelligible information for a sound assessment of the company's condition [109]. As with the other directives, publication in a national newspaper is required [110]. While half-yearly reports of this type do not match U.S. requirements for 10-Q and 8-K reports of price-sensitive information, the requirements of this Directive add to the EEC's disclosure pool.

Taken as a whole, this group of directives provides for narrative disclosure which closely approximates U.S. disclosure requirements for foreign issuers [111]. At the same time, the EEC requirements for publication in national financial newspapers provides for more extensive dissemination of the disclosed information than U.S. requirements for filing with the SEC and supplying prospectuses to purchasers.

3.2. Disclosure Requirements Related to Accounting Principles and Auditing Standards for Financial Statements

The provisions of the Fourth Directive [112] require that virtually all issuers, whether or not listed on an official stock exchange, must file annual reports and duly approved annual accounts through the registry mechanism set up in the First Directive [113]. This Directive sets minimum standards for the content and presentation (layouts) of balance sheets and profit and loss accounts [114]. It sets valuation rules [115], as well as requirements for the content of notes on the annual accounts [116] and annual reports [117]. It further requires auditing of annual accounts and verifying the consistency of the annual report with the accounts of its fiscal year [118].

The Fourth Directive represents a compromise between two different historical approaches to national requirements for corporate financial accounting that exist within the EEC [119]. The directive sets out strict rules as to valuation, form, and information required, which is consistent with the continental tradition applied in France and Germany [120]. At the same time, the overriding principle in the Directive is to present an accurate and fair account oi the company's fiscal position even if this requires departing from a rule. This latter approach is taken from the U.K. and Irish tradition [121].

It took the EEC ten years, working its way around sensitive problems relating to the contents and methods of disclosure, before final adoption of the Fourth Directive [122]. Even now, Ireland, Italy, and Germany, in addition to Greece, Spain, and Portugal, remain in noncompliance with this Directive by not incorporating its requirements into their national regulations [123]. The Irish and Italian authorities plan to implement this Directive in due course. The German authorities, however, are facing a lengthy delay while they determine which companies must be required to comply with the Directive [124]. Despite the difficulties, however, the Fourth Directive's requirements are vital to providing comparable, publicly available financial disclosures. Annual reports play a central role in a disclosure scheme as a basis for research and analysis.

The requirements of the Fourth Directive form the basis for proposed financial reporting requirements for banks and other investment institutions [125]. The Directive's importance receives added weight when considered together with the requirements for consolidated accounts provided by the Seventh Directive [126] and for approving auditors found in the recently adopted Eighth Directive [127].

The Seventh Directive's goal is to provide a true and fair view of enterprises taken as a whole. Except for certain exempted or excluded undertakings [128], the Seventh Directive provides for drawing up of consolidated accounts and consolidated annual reports for parent enterprises with one or more subsidiaries [129]. This Directive defines a parent–subsidiary relationship in considerable detail [130] and includes subsidiaries without regard to whether they are located inside the EEC [131]. It details the layout and contents of the accounts and reports [132], and requires them to be audited [133]. It also adopts the publication and registry provisions of the First and Fourth Directives [134].

Taken together, the Seventh and Fourth Directives promise consolidated accounts both prepared and presented in a manner that gives a clear and fair view of multinational enterprises operating within the EEC [135]. At present, however, compliance with the Seventh Directive is voluntary [136] because the implementation schedule does not mandate the first actual consolidated reports until 1990 [137]. Notwithstanding this implementation date, consolidated accounts were required for companies quoted on the French exchanges beginning in 1985 [138]. Other EEC countries are not expected to implement the consolidation requirements of the Seventh Directive in the near future [139].

The Eighth Directive, adopted in 1984, provides standards for the education [140], training [141], and testing [142] of individuals qualifying as auditors of the accounting documents provided for in the various directives. The Eighth Directive also provides for qualification of auditing firms [143]. As a companion to the Fourth and Seventh Directives, this Directive plays the role of assuring high standards for the auditors which, in turn, protects the quality and integrity of the required disclosures.

Harmonizing accounting and auditing practices in EEC member states, as previously noted, takes place against a backdrop of traditionally varied national standards. The accounting profession in the Netherlands, for example, employs principles quite similar to those used in the U.S. and the U.K. [144]. West German and French accounting professionals, however, employ less extensive requirements [145]. Also, it should be noted that the requirements of the Eighth Directive represent an initial step toward prescribing qualifications for auditors. While the area of financial statements does not approximate U.S. requirements for foreign issuers as closely as the area of narrative disclosure, it has been argued that, taken together, these aspects of EEC disclosure "cannot be regarded as having lesser quality than the protection deriving from the U.S. disclosure system" [146].

3.3. Disclosure of Information to Company Employees

The Proposed Fifth Directive [147] on the structure of companies, including the powers and obligations of their boards, warrants consideration in conjunction with the Proposed Directive on Procedures for Informing and Consulting Employees (Vredeling Proposal) [148]. The Proposed Fifth Directive addresses company structure [149]. It includes employee rights to participation in the structure [150] and employee access to financial information [151]. It also sets forth requirements for the independence of auditors of annual financial statements [152].

Disclosure to employees remains a key feature of the revised Vredeling Proposal. In addition, it specifies information which must be disclosed to employees in a special yearly report [153]. The Proposal requires prompt notice to and consultation with employees concerning any information with serious consequences for the company and which affects employee interests, including moving or closing a plant or substantially modifying its activities [154]. The proposal also provides a mechanism for appeal to outside authorities in the even of company noncompliance [155].

These two proposed directives clearly go beyond the disclosure requirements in the U.S. United States multinational enterprises operating subsidiaries in EEC countries could be required to disclose such information under the EEC's system. U.S. companies will probably object to the requirements as overburdensome.

4. United States Disclosure Requirements for Foreign Private Issuers

This Section confines itself primarily to an evaluation of the basic instruments in the U.S. regulatory scheme that concern foreign private insurers: (1) Form 20-F and the full components of the foreign integrated disclosure system; and (2) requirements relating to quotation on NASDAQ. While other components of the U.S. regulatory system are important, the evolution of these requirements provides a focal point for understanding recent SEC approaches to foreign private issuers. In addition, this Section will address the SEC's recent proposal for facilitating multinational offerings in the context of the relationship between the EEC and U.S. disclosure systems.

At the time Form 20-F was proposed [156], foreign issuers utilized no special registration form; instead, like domestic issuers, they used Form S-1 [157]. The adoption of Form 20-F in 1979 [158], with its special provisions, received the praise of commentators who labeled it a serious step towards reconciling U.S. requirements with international disclosure trends [159].

Several special considerations for the circumstances of foreign issuers appeared in the form. First, issuers were allowed to use their home-country financial statements, as long as any material differences with U.S. "Generally Accepted Accounting Principles" (GAAP) were explained. Secondly, management remuneration was permitted to be reported in the aggregate rather than in individualized form. Thirdly, segment reporting was modified and could be calculated on a revenue basis, accompanied by an explanation of any material differences in the contributions of profits and revenues. Finally, issuers were granted flexibility in reporting management interest in certain transactions, permitting use of home-country standards, if reasonable [160].

4.1. The Foreign Private Issuer Integrated Disclosure System

The 1979 version of Form 20-F remained in use until its requirements were heightened as part of implementing the foreign issuers' integrated disclosure program [161]. A new version of the form made several changes to Items 17 and 18, added requirements for Selected Financial Data in Item 8, and added Management's Discussion and Analysis of Financial Conditions and Results of Operations (MD&A) in Item 9 [162]. The instructions regarding financial statements were also revised substantially [163].

The old version allowed the issuer to explain significant differences between its financial statements and U.S. requirements; the new version, however, provides no such allowance [164]. The new Item 18 requires full reconciliation with U.S. GAAP and accounting provisions in Regulation S-X [165]. In addition, the new version's financial reporting requirements no longer allow convenience translations of foreign currency in financial statements [166]. The MD&A provisions require discussion of operating results, capital resources, and liquidity [167]. Revisions related to Selected Financial Data require disclosure of current exchange rates, exchange rate history, and dividends per share in U.S. dollars [168]. While few in number, the revisions drew criticism as overly burdensome and likely to inhibit foreign issuer entry into the U.S. market [169].

A series of forms geared to integrated disclosure as introduced at the same time as the new Form 20-F: Forms F-3, F-2, and F-1 [170]. They provide for incorporation by reference, by allowing for full incorporation of the information filed in Form 20-F to Form F-3, the attachment of Form 20-F to Form F-2, and the inclusion of the Form 20-F information in Form F-1 [171]. Form F-1 is used by foreign private issuers filling Form 20-F, but who do not qualify for filing Forms F-2 or F-3. Form F-1 is available for most types of offerings and may be used by majority-owned subsidiaries of entities qualified for its use [172]. Form F-2 is available to world-class issuers and issuers who are three-year registrants with the SEC. It is also available for investment grade debt securities of issuers who filed at least one prior Form 20-F. Issuers and subsidiaries experiencing serious financial difficulties are barred from employing Form F-2 [173]. Form F-3's use is limited to registering securities which are offered for cash by the issuer, including cash in secondary offerings, offerings of non-convertible investment grade debt securities, and specified rights offerings [174].

Forms F-1, F-2, and F-3 are equivalent to Forms S-1, S-2, and S-3 required by the integrated disclosure system for domestic issuers [175]. Along with the changes in Form 20-F, which bring it more in line with the domestic registration Form 10-K, the foreign integrated disclosure system brings the foreign issuer disclosure requirements closer to the domestic issuer requirements [176]. Several features of the integrated disclosure system for foreign private issuers, effected through the changes in Form 20-F reporting requirements, are open to criticism as being overly burdensome on foreign companies. Heading the list are the Item 18 requirements of full reconciliation and quantification with U.S. GAAP and Regulation S-X. One criticism advanced is that these requirements in effect render it necessary for foreign issuers to prepare two sets of financial statements – one for home-country disclosure and another for the U.S. [177].

Under the original Form 20-F requirements, a narrative description of any material differences between home-country and U.S. GAAP satisfied U.S.

reporting provisions. This allowed reporting companies to use their domestic annual reports as the core of their Form 20-F reports [178]. When adding full reconciliation and quantification requirements, the SEC did not mention that any problems were caused by the narratives. This has prompted questions concerning the necessity of the additions [179].

A second focus of criticism centers upon Item 18's requirement for full reporting of profits or losses by corporate business categories and geographical segments in all but certain limited offerings by foreign issuers. Such full-segment reporting falls beyond the reporting norms in most countries [180]. The EEC's Information Directive, for example, requires reporting a breakdown of net turnover by categories of activity and geographical markets on a revenue basis, not by profit and loss [181].

The original Form 20-F requirements were consistent with the EEC approach. They modified segment reporting to allow reports on a revenue basis, provided that an explanation of any material differences in contributions of profits and revenues accompanied the report. These changes in Form 20-F are not the sole examples of relatively recent action by the SEC equalizing foreign and domestic issuer requirements.

4.2. Requirements for Foreign Private Issuers Quoted on NASDAQ

At practically the same time as the SEC instituted the foreign issuer integrated disclosure system, it asked for comment on a proposal to remove a major reporting exemption for foreign issuers whose securities or American depository receipts for such securities are quoted on NASDAQ [182]. The proposal required all such issuers to register under the 1934 Act by filing Form 20-F. The SEC reasoned that since NASDAQ's role in the over-the-counter market has grown to the proportion of an organized securities exchange, quotation there should be considered a voluntary entry into the domestic market [183].

The proposed denial of the information-supplying exemption drew over 150 public comments: 26 favored removal of the exemption and 133 comments opposed the proposal [184]. Those favoring the proposal stated that it would result in more disclosure, increased confidence in the affected securities, and enhanced antifraud protection for investors [185]. Commentators opposing the proposal claimed that it would result in many foreign issuers withdrawing their securities from NASDAQ quotation while continuing to trade them in less closely scrutinized over-the-counter transactions [186]. These comments noted that such a development would in turn result in less disclosure, lower investor confidence in the affected securities, and increased possibilities for fraud [187]. In addition, many commentators questioned the need for the change, given that the SEC did not cite any problems with the existing system [188].

Following receipt of the comments, the SEC removed the applicable 1934 Act reporting exemption for all new non-North American foreign issuers authorized for quotation on NASDAQ; however, the SEC retained the exemption for issuers quoted on October 5, 1983, provided that they maintained a continuously traded status and remained in compliance with related SEC requirements [189]. As a consequence of this SEC action, the treatment accorded to foreign securities authorized for quotation on NASDAQ after October 5, 1983, has approximated the treatment of foreign securities listed on a stock exchange in the United States [190]. In sum, the SEC's action further equalized treatment of foreign and domestic issuers.

It is worth noting that only twenty-eight EEC corporations qualified for the exemption from the 1934 Act registration requirements on the October 5 cut-off date [191]. Assuming that registration remains a deterrent to foreign issuer entry into the domestic capital markets, quoted EEC securities may remain at a low number in the immediate future.

4.3. The SEC's New Proposal for Facilitating Multinational Securities Offerings

The SEC recently unveiled a new effort to harmonize requirements for simultaneous offerings of securities in the United States, Canada, and the United Kingdom [192]. Two alternative approaches for facilitating such offerings were noted: a "reciprocal approach" and a "common prospectus approach" [193].

The reciprocal approach would entail the three countries' agreeing to common minimum disclosure standards for simultaneous offerings. Each country would then set up a system by which a qualified offering document or prospectus brought to it by an issuer domiciled in either of the other two countries would be sufficient for issuing that security in its jurisdiction. The common prospectus approach would require the three countries to reach agreement upon one disclosure instrument which an issuer would file simultaneously in two or all three of the jurisdictions. Thus, under this approach, the three countries would share responsibility for reviewing the common prospectus, whereas, under the reciprocal approach, only the home country would review the offering document.

The SEC noted that the reciprocal approach would be easier to implement and would be less costly and time-consuming to issuers [194]. At the same time, the SEC pointed out that this approach eliminates the incentive to approximate disclosure requirements and could provide less comparable information than the common prospectus would likely yield [195]. The SEC also pointed out that in addition to enhancing comparability of disclosure information upon initial offerings, the common prospectus approach might, over time, build a bank of information on issuers that would aid decision-making in secondary trading [196]. Disadvantages of the common prospectus approach, noted by the SEC, included the multiplicity of review, which would waste regulatory resources, and the process of reaching agreement on a common prospectus, which would be more difficult than taking the reciprocal approach [197].

Harmonizing requirements will require addressing substantial differences in the three countries' present regulations. The issues to be addressed include: disclosure related to the description of the issuer's nature, character, business, and management; requirements for MD&A; industry segment reporting; disclosure of management's business experience, remuneration and beneficial ownership of the issuer's securities; and disclosure related to financial statements, GAAP requirements, and related topics [198].

While the the common experience and similarities in regulatory requirements among the three countries provide a basis for discussion, other countries could be considered in the effort to harmonize requirements for simultaneous offerings of securities. Public comments from issuers and regulatory institutions were sought as part of the SEC's considerations [199]. This provided an opportunity not only for comment, but for interested countries to participate in the process. The period for comment and follow-up considerations over the following year to eighteen months gave the SEC time to adjust and reformulate its approach. The entire process holds promise for the further internationalization of the world's capital markets.

5. Analysis and Discussion

At this point, certain trends are identifiable; however, further research is needed. The narrative aspects of disclosure requirements in the U.S. and in the EEC are practically equivalent, while requirements for disclosure and format of financial statements do not approximate themselves as closely. At the same time, differences exist in requirements for training and qualifying auditors of financial statements.

A further comparison of U.S. and EEC requirements for financial statements should be conducted. The comparative study should examine the provisions of the Fourth and Seventh Directives on corporate and consolidated accounts in relation to U.S. GAAP and Regulation S-X requirements called for in Item 18 of Form 20-F. This examination would clarify the major differences in these aspects of the two disclosure systems and would help determine if barring foreign issuer entry to the U.S. markets based upon such differences is justified.

Given the degree of similarity between the U.S. and EEC disclosure requirements, the possibility of allowing a narrative explanation of any material differences between foreign and U.S. requirements should be reconsidered. Issuers from countries which maintain the EEC's level of financial statement disclosure requirements could qualify for such treatment. This approach would strike a balance between not requiring any reconciliation to U.S. GAAP and the present requirement of total reconciliation. A second intermediate approach would be to follow the U.K.'s policy of not requiring reconciliation to U.K. GAAP as long as an issuer's financial statements conform to the International Accounting Standards Committee's provisions.

In addition, a foreign issuer could satisfy concerns about variations in "Generally Accepted Auditing Standards" (GAAS) by engaging a U.S. auditing firm or its foreign affiliate. This practice is presently employed by some foreign world-class issuers [200]. Such an alternative would fall between simply allowing compliance with home-country GAAS, and requiring absolute compliance with U.S. GAAS.

Another area which needs more investigation concerns the functioning of the EEC disclosure system as a whole. Questions of how the various EEC directives interrelate and to what extent the disclosure system is implemented in the various member states deserve attention. This examination may be problematic because the disclosure system and its state of implementation are fluid; new directives are under consideration and adopted directives have varying effective dates. Further, member states give effect to the directives in accordance with their national regulatory systems and make adjustments as both needs and resources arise [201].

It is beyond the realm of the SEC to track the implementation of EEC directives. If, however, official notice is taken by the SEC and an assessment of EEC disclosure requirements is made, a foreign issuer could file a certification from its home state as to the enforcement status of the requirements and a statement certifying compliance with them [202]. This, of course, would be subject to U.S. prohibitions against material misstatements in securities filings [203].

Underlying the policy alternatives in areas such as financial statements and recognition of foreign disclosure regulations is the question of where to place the basic entry threshold for foreign issuers. At one end of the spectrum is total accommodation of the distinctive circumstances of foreign companies. At the other end is the belief that entry into U.S. markets waives any consideration of foreign status.

United States regulatory requirements in the last several years have moved towards equalizing treatment of foreign and domestic issuers. Extending short-form reporting to foreign companies through the foreign private issuer disclosure program significantly eases certain aspects of reporting for registered companies. At the same time, however, failing to allow for the distinctive position of such companies creates greater regulatory burdens. These burdens, coupled with changes in the registration requirements for foreign issuers quoted on NASDAQ, raise regulatory barriers to future foreign issuer entry into U.S. markets.

The common prospectus and reciprocal approaches discussed in the SEC's proposal to facilitate multinational offerings strike a middle ground between the extreme ends of the regulatory spectrum. Developing a common prospectus with other countries to allow simultaneous offerings would necessitate recognition of the distinctive characteristics of issuers in those countries. This approach would provide the opportunity to advance concerns for protecting the integrity of the U.S. market. The reciprocal approach would also provide assurances of domestic market integrity by setting minimum standards for using that approach, while it would allow for wider consideration of issuers' home-country conditions.

An advantage of pursuing the reciprocal approach is that it would create a greater opportunity for other countries to join the process or to harmonize their disclosure requirements at a later date. This is particularly relevant to EEC countries which already share a common scheme with the United Kingdom. They may feel that the U.K.'s role in the present three-country effort represents EEC interests to a significant degree, allowing them to more easily join the process. Of course, non-EEC countries, such as Japan or Switzerland, may follow the developments and later choose to join the reciprocal model.

6. Conclusion

Facilitating the internationalization process would be advantageous to U.S. interests. Today U.S. companies enjoy easier access to foreign capital markets than foreign issuers enjoy here. As foreign markets develop, however, access could be restricted for U.S. issuers; such retaliatory measures are not rare in international economic relations [204]. Diminishing the possibilities of such actions would benefit U.S. issuers. Another advantage which might be gained in exchange for enhanced foreign issuer access to U.S. markets could be the removal of foreign blocking and secrecy laws which hinder investigations and prosecutions by U.S. officials pursuing violators of U.S. securities laws. These factors should be considered together with the previously noted potential benefits to U.S. investors which would accompany enhanced access to foreign securities in the domestic market [205].

The EEC experience in harmonizing disclosure standards supports an approach of cautious cooperation. This seems particularly valuable in the face of growing internationalization in the world's capital markets. Unilateral and protectionist approaches seem particularly inappropriate when looking into the second half-century since the major U.S. securities laws were passed. The present considerations and posture of the SEC toward multinational offerings provide a keen opportunity for the United States to further participation in the internationalizing trend. Unavoidably, this trend will significantly mark the future of the world's securities markets.

Appendix A: EEC Directives and Proposed Directives Relevant to Securities Disclosure

Sources: Official Journal of the European Community (O.J.); 1 Common Market Reporter (CCH); Int'l Business Lawyer, Nov. 1984, at 425–30.

1st Directive 68/151/EEC Adopted 3/9/1968, O.J. 3/14/1968. Adopted by all MSs* but Greece, Spain and Portugal. Implementation problems noted in U.K., W. Ger. and Italy.	On coordination of safeguards required of companies: – includes requirements for disclosure of balance sheet, profit & loss accounts, and relevant info on financial trends; – obtainable by public for cost; – published in nat'l magazine designated by MS. *Member	Effective Date: 12/31/1970.
State(s)		
2nd Directive 77/91/EEC Adopted 12/13/1976, O.J. 1/31/1977. Adopted by all MSs but Greece, Belgium, Italy, Spain and Portugal.	On coordination of safeguards required of companies: – company formation, and protection of shareholders' & creditors' interests.	Effective Date: No later than 1/1/1979.
3rd Directive 78/855/EEC Adopted 10/19/1978, O.J. 10/10/1978. Adopted only by Den. & Neth.; however, MSs assumed to be implementing it jointly with the 6th Dir. effective 1/1/1986, except in some respects for U.K. and Ireland.	Based on Treaty of Rome art. 54(3)(g): – coordination of corporate mergers within a Member State; – disclosure of merger proposal; – closely relates to the 6th Directive.	Effective Date: No later than 12/1/1981.

4th Directive 78/660/EEC Adopted 7/25/1978, O.J. 8/14/1978. Adopted by all MSs except W. Ger., Ireland, Italy, Greece, Spain and Portugal.	Based on art. 54(3)(b): - annual accounts of certain types of companies; - minimum standards for balance sheet, profit & loss acct., notes to accts., layouts, etc.; - related to the 7th & 8th Directives.	Effective Date: No later than 8/1/1980, (with exception for shipping co.'s until 1988).
Proposed Directive 3/19/1981, Amended 3/14/84.	Annual accounts of banks and other financial institutions: - Complements 4th Directive.	
Proposed 5th Directive 10/9/1972, Amended 8/19/1983.	Based on art. 54(3)(g): - structure of co.'s, powers & obligations of organizations, includes: - employee representation; - audits & approval of annual accounts.	
Proposed Directive 10/23/1980, Amended 6/1983 O.J. No. C217/3, 8/12/1983.	"Vredeling Proposal": - informing and consulting employers of complex structures, on important company developments.	

Council Directive 79/279/EEC Adopted 3/5/1979, O.J. 3/16/1979. Status of adoption by Member States not determined.	"Listing Directive" Coordinating conditions for admission of securities to official stock exchange listing: – detailed schedules of requirements; – timely reporting of price-sensitive information; – publication of disclosure material in newspapers; – coordination of simultaneous multistate listing; – enforcement of delisting & suspension.	Effective Date: No later than 6/30/1983.
Council Directive 80/390/EEC Adopted 3/17/1980, O.J. 4/17/1980. Status of adoption not determined.	"Information Directive" [formerly called the "Sixth Dir."] Listing particulars to be published for admission of securities to official stock exchange: – minimum general requirements [approximate U.S. SEC Form 20-F].	Effective Date: No later than 6/30/1983.
Council Directive 82/121/EEC Adopted 2/15/1982, 6/30/1983. O.J. 2/20/1982. Status of adoption by Member States not determined.	On information to be published on a regular basis by co.'s with shares listed on a stock exchange: – half-yearly reports.	
Proposed Directive 1/13/1981, Amended 7/19/1982.	Prospectus requirements for securities offered to the public: – equivalent to "Listing Directive" but for unlisted securities.	

6th Directive 82/891/EEC Adopted 12/16/1982, O.J. Dec. 1982. No Member State has yet adopted.	[see 80/390/EEC *supra* for original 6th Directive] Based on art. 54(3)(g) concerning the division of companies: – closely related to 3rd Directive; – publication of proposal; – shareholder approval; – disclosure requirements; – employees' and creditors' rights.	Effective Date: 1/1/1986.
7th Directive 83/349/EEC Adopted 6/13/1983, O.J. 7/18/1983. Implementation may extend beyond required dates.	Based on art. 54(3)(g) concerning consolidated accounts: – extension of 4th & 8th Directives; – method, content & notes to accounts, definitions.	Effective Date: 1/1/1988.
8th Directive 84/253/EEC Adopted 3/13/1984, O.J. 4/10/1984. No Member State had yet adopted.	Based on art. 54(3)(g) approval requirements for auditors of accounting documents: – complements 4th & 7th Directives; – requirements for education, testing and qualifications.	Effective Date: 1/1/1988, may extend to 1/1/1990.
Proposed 9th Directive 2/15/1984. Not expected to be adopted by EEC in near future.	Based on art. 54(3)(g), links between undertakings, "Groups": – definition of related enterprises based on "German Concern Law."	

Notes

[1] Williams & Spencer, *Regulation of International Securities Markets: Towards a Greater Cooperation*, 4 J. Comp. Corp. L. & Sec. Reg. 55, 56 (1982).

[2] *See* Letter from James E. Buck, Secretary of the New York Stock Exchange, to George A. Fitzsimmons, Secretary of the SEC 3–10 (Apr. 5, 1982) (available in SEC Comment File No. S7–915 at the SEC's Public Reference Room, Washington, D.C.) [hereinafter cited as NYSE Letter]. The SEC believes that the benefits of foreign securities offerings in the U.S. are significant while the dangers are minimal. *Id*

[3] *See, e.g.*, Rowe, *SEC Integrates Foreign Issuer Disclosure Rules*, in 11 SEC 83, 127, 131 (1983).

[4] *Id.* at 131.

[5] It has been noted that foreign issuers are critically misinformed with regard to U.S. securities laws, and some action is required to reduce the common misconceptions. Nathan, *Special Problems Arising as a Result of Trading in Multiple Markets*, 4 J. Comp. Corp. L. & Sec. Reg. 1, 9 (1982).

[6] *See infra* notes 77–81 and accompanying text.

[7] *See infra* notes 61–66 and accompanying text.

[8] Greene & Ram, *Securities Law Developments Affecting Foreign Private Issuers*, Int'l Fin. L. Rev., Feb. 1983, at 13–14.

[9] *See* NYSE Letter, *supra* note 2, at 3–4.

[10] A world-class issuer may be defined as a foreign private issuer with an aggregate worldwide market value of voting stock held by non-affiliates worth at least $300 million. *See* SEC Release No. 33-6437, 47 Fed. Reg. 54,764, 54,765 (1982); *see also* SEC Form F-3, General Instructions I.A.4, 2 Fed. Sec. L. Rep. (CCH) ¶ 6972, at 6172; Greene & Ram, *supra* note 8, at 6; Letter from Morimasa Yamada, Director and General Manager of the International Finance Department, The Nomura Securities Company, Ltd. (Japan), to George A. Fitzsimmons, Secretary of the SEC 4 (Mar. 30, 1982) (available in SEC Comment File No. S7–915) [hereinafter cited as Nomura Letter].

[11] *See generally* Cohen, *International Securities Markets: Their Regulation*, 46 St. John's L. Rev. 264, 264–65 (1971) (crediting this development on imaginative and persevering bankers and businessmen).

[12] *See infra* notes 27–32 and accompanying text.

[13] The concept of a global electronic network linking various national securities markets received the attention of Manuel Cohen, former Commissioner and Chairman of the SEC more than a dozen years ago. Cohen, *Toward an International Securities Market*, 5 L. & Pol'y Int'l Bus. 357, 357 (1973). It is worth noting that at the end of 1970, U.S. private investment in foreign securities stood at $19.6 billion; by 1981 it increased more than threefold to $62.1 billion. Thomas, *Extraterritoriality in an Era of Internationalization of the Securities Markets: The Need to Revisit Domestic Policies*, 35 Rutgers L. Rev. 453, 453 (1983). During that same period, foreign investment in the domestic securities market went up from $25.6 billion to $74 billion. *Id.* This foreign investment figure is projected to reach $200 billion by the end of 1986. J. Fedders, former Director of the Enforcement Division of the SEC, Lecture delivered at the Wharton School of Finance and Commerce of the University of Pennsylvania (Nov. 11, 1984) [hereinafter cited as Fedders].

[14] Fedders, *supra* note 13.

[15] At present, the U.S. has 10 markets, West Germany has 8 (Frankfurt and Düsseldorf predominate), France has 7 (the Paris Bourse predominates), Switzerland has 7 (Zurich and Geneva predominate), and Italy has 8 (Milan predominates). Bloomenthal, *Introduction*, in International Capital Markets and Securities Regulation 22 (H. Bloomenthal ed., rev. ed. 1984).

[16] For example, Tokyo had market assets of $341 billion, London had $133 billion, Montreal had $113 billion, Frankfurt had $72 billion, Toronto had $67 billion, and Paris had $45 billion. Bass, *The Allure of London*, Institutional Investor, July 1984, at 72.

[17] Williams & Spencer, *supra* note 1, at 56–57.

[18] Bass, *supra* note 16, at 72.

[19] *Id.*

[20] Fedders, *supra* note 13.

[21] The two principal reasons why U.S. investors purchase foreign securities are higher expected returns and greater diversification of risk. NYSE Letter, *supra* note 2, at 2.

[22] For a discussion of relative yields see Thomas, *Internationalization of the Securities Markets: An Empirical Analysis*, 50 Geo. Wash. L. Rev. 155, 163–66 (1982). Thomas' figures demonstrate that during the last decase the yield on U.S. stocks was less than the yield on stocks in the United Kingdom, West Germany, Switzerland, Japan, Canada, and Australia. *Id.* at 164.

[23] *See id.* at 164–65. There is a low correlation between the stock index of the U.S. and the indices of more than a dozen other industrialized countries, according to several studies. *Id.*

[24] The Eurobond market, a very fast market for primary offerings of debt securities, has played an important role in the internationalization process. *See* Williams & Spencer, *supra* note 1, at 55–56. Eurobonds are generally not regulated because they are not issued in the local currencies of the countries where they are sold and because European governments have agreed to treat their issues as fictitious private offerings. *See, e.g.*, Cohen, *supra* note 13, at 377. U.S. corporations issued $26.3 billion in Eurobond offerings from 1982 through the first half of 1984. *The One World Capital Market*, Euromoney, Oct. 1984, at 106.

[25] For example, U.S. natural resource companies are attracted to the Vancouver market because it is an international center for natural resource risk capital. *See* Williams & Spencer, *supra* note 1, at 55; *see also* Bass, *supra* note 16, at 75 (discussing International Signal & Control's decision to go public in London rather than in the United States).

[26] *See, e.g.*, Bass, *supra* note 16, at 75 (discussing Allegheny International's acquisition of the Wilkinson Sword Group in relation to the disadvantage of not being listed on the London Exchange).

[27] *See generally* Bloomenthal, *supra* note 15, at 5.

[28] The U.S., for example, prevents foreign investment in atomic energy, fishing, and some land development, among other areas. *Id.*

[29] *See id.; see also infra* note 51.

[30] *See* Williams & Spencer, *supra* note 1, at 56.

[31] *Id.* at 57.

[32] For a brief discussion of national differences relating to accounting standards, consolidation of subsidiaries' information, and financial disclosure, see Cohen, *supra* note 13, at 395–96.

[33] Cohen, *supra* note 11, at 271.

[34] *See id.*

[35] *Id.*

[36] *Id.*

[37] *See* Cohen, *supra* note 13, at 378.

[38] *See id.*

[39] *Id.* at 360 n.8.

[40] *Id.*

[41] Bloomenthal, *supra* note 15, at 39. As a boost to the development of the French securities markets, the Giscard government created tax incentives to encourage mutual funds. These funds, in turn, had to be invested in French securities. *Id.* While some increase in liquidity resulted, exchange controls limited foreign investors' and issuers' access to the market. *Id.*

[42] *See id.* at 37 (the value of the coins was placed at $15.6 billion).

[43] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter cited as Treaty of Rome].

[44] *Id.* at art. 3(c).

[45] *Id.* at art. 8.

[46] *See, e.g.*, Nieuwdorp, *Status Report on EEC Company Law Harmonisation*, 12 Int'l Bus. Law. 425 (1984).

[47] For a discussion of the company law directives, see *infra* notes 77–155 and accompanying text, and Appendix A.

[48] *See* Nathan, *supra* note 5, at 1. Of the 1,412 companies listed on the Tokyo Stock Exchange, only 17 were registered with the SEC as of March 30, 1982. Nomura Letter, *supra* note 9, at 3.

[49] Bloomenthal, *supra* note 15, at 5.

[50] Nathan, *supra* note 5, at 1.

[51] For example, the Interest Equalization Tax, effective from 1963 until 1974, was aimed at restraining U.S. multinational enterprises from moving capital abroad, as well as at blocking foreign borrowers from taking advantage of the then lower interest rates and liquidity of U.S. capital markets. One important effect of the tax, however, was to *increase* the entry of multinational enterprises into the Eurobond market, which began to operate in 1963. *See generally* Bloomenthal, *supra* note 15, at 4; Cohen, *supra* note 13, at 373–74.

[52] Securities Act of 1933, 15 U.S.C. §§ 77a–kk (1982).

[53] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–kk (1982).

[54] Greene & Ram, *supra* note 8, at 4.

[55] *See* Letter from Frank J. Wilson, Executive Vice President and General Counsel of the National Association of Securities Dealers, to George A. Fitzsimmons, Secretary of the SEC 2 (Mar. 23, 1983) (available in SEC Comment File S7–951) [hereinafter cited as NASD Letter]. *But see infra* notes 182–91 and accompanying text (discussing changes in the SEC's reporting requirements).

[56] *See generally* Greene & Ram, *supra* note 8, at 14 (the absence of liberalized disclosure requirements for foreign issuers will continue to impede U.S. foreign issuer public offerings).

[57] *See, e.g.*, Letter from C.J.R. May, Group Controller, The BOC Group, plc (U.K.), to George A. Fitzsimmons, Secretary of the SEC 2, 5 (Mar. 29, 1982) (available in SEC Comment File No. S7–915) [hereinafter cited as The BOC Group Letter].

[58] *See, e.g.*, International Accounting Standard No. 14, ¶ .08 (Aug. 1981), *quoted in* NYSE Letter, *supra* note 2, at 14.

[59] Letter from Goldman, Sachs & Co. to George A. Fitzsimmons, Secretary of the SEC 3, (Mar. 31, 1982) (available in SEC Comment File No. S7–915) [hereinafter cited as Goldman, Sachs Letter].

[60] Nomura Letter, *supra* note 9, at Appendix (Table 1 illustrating foreign private issuer integrated disclosure system).

[61] SEC Release No. 34–14,128, 42 Fed. Reg. 58,684 (1977).

[62] Pozen, *Disclosure and Trading in an International Securities Market*, 15 Int'l Law. 84, 84 (1981). For further discussion of the innovative aspects of Form 20–F, see *infra* notes 156–98 and accompanying text.

[63] Pozen, *supra* note 62, at 86. For an item-by-item comparison of Form 20–F and the Information Directive, see Pozen, *International Securities Markets: Comparative Disclosure Requirements*, 3 J. Comp. Corp. L. & Sec. Reg. 392, 397 (1981) (Appendix XIV-A prepared by Douglas Hawes). A discussion of this Directive's requirements is presented *infra* notes 105–07 and accompanying text.

[64] The SEC proposed the domestic integrated disclosure system in 1980. *See* SEC Release No. 33–6235, 45 Fed. Reg. 63,693 (1980); *see also* SEC Comment File S7–849. The system was adopted using SEC Forms S-1, S-2, and S-3 in 1981. *See* SEC Release No. 33–6331, 46 Fed. Reg. 41,902 (1981).

[65] SEC Releases No. 33–6360, 46 Fed. Reg. 58,511, No. 33–6361, 46 Fed. Reg. 58,505, and

No. 33-6362, 46 Fed. Reg. 58,507 (1981). *See generally* SEC Comment File No. S7-915 (containing letters from interested parties around the world).

[66] SEC Release No. 33-6437, *supra* note 10. The F-series forms are discussed *infra* notes 156-81 and accompanying text. For a concise review of the historical interaction between the 1933 Act and 1934 Act requirements, see Greene & Ram, *supra* note 8, at 4-5.

[67] For a general discussion of the impact of the foreign integrated disclosure system as adopted, see Greene & Ram, *supra* note 8, at 8; Rowe, *supra* note 3.

[68] *See, e.g.*, Greene & Ram, *supra* note 8, at 14; Rowe, *supra* note 3, at 147.

[69] Hudson, *Foreign Firms' Disclosure Rules Eased by SEC*, Wall St. J., Nov. 19, 1982, at 56, col. 1.

[70] Wall St. J., Nov. 18, 1982, at 40, col. 2 (criticizing system for not providing enough information on foreign issuers).

[71] *See, e.g.*, Greene & Ram, *supra* note 8, at 14; Rowe, *supra* note 3, at 147.

[72] *See* SEC Release No. 33-6493, 48 Fed. Reg. 46,736 (1983) (especially discussion of 17 C.F.R. §240.12(g)(3)-2(d)(3) (1985)).

[73] *Id.; see also infra* notes 165-74 and accompanying text.

[74] Telephone interview with Mr. Carl T. Bodolus, Director of the Office of International Corporate Finance, Division of Corporate Finance, SEC (Feb. 20, 1985).

[75] SEC Release No. 33-6568, 50 Fed. Reg. 9281 (1985).

[76] *Id.* At the SEC's public meeting on February 28, 1985, officially approving and announcing this concept release, all five Commissioners took special note of the importance of the internationalization trend. (transcript of this meeting is available at the SEC).

[77] Treaty of Rome, *supra* note 43, at art. 189, para. 3.

[78] *Id.*

[79] *See* Timmermans, *Directives: Their Effect Within the National Legal Systems*, 16 Common Mkt. L. Rev. 533, 534-35 (1979).

[80] The Fifth Proposed Directive Concerning Collective Investment Undertakings for Transferable Securities (CIUTS) was submitted to the EEC Council on April 29, 1976. 19 O.J. Eur. Comm. (No. C 171) 1 (1976), 1 Common Mkt. Rep. (CCH) ¶ 1495. However, it falls outside the scope of this Article.

[81] Three of the directives and two of the proposed directives relate only tangentially to disclosure requirements and, therefore, will not be discussed. They include the Second Directive, 20 O.J. Eur. Comm. (No. L 26) 1 (1977), 1 Common Mkt. Rep. (CCH) ¶ 1355, which concentrates on requirements for company formation; the Third Directive, 21 O.J. Eur. Comm. (No. L 295) 36 (1978), 1 Common Mkt. Rep. (CCH) ¶ 1361, which concentrates on corporate mergers; the Sixth Directive, 25 O.J. Eur. Comm. (No. L 378) 47 (1982), 1 Common Mkt. Rep. (CCH) ¶ 1411, which concentrates on corporate divisions; and the Proposed Directive of March 19, 1981, 24 O.J. Eur. Comm. (No. C 130) 1 (1981), *amended by* 27 O.J. Eur. Comm. (No. C 83) 6 (1984), 1 Common Mkt. Rep. (CCH) ¶ 1394, which concentrates on annual accounts of banks and other financial institutions as a complement to the Fourth Directive.

The Proposed Ninth Directive, defining groups of companies and links between undertakings, fits into the scheme of the Fourth and especially the Seventh Directives. *See* Bohlhoff & Budde, *Company Groups - The EEC Proposal for a Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany*, 6 J. Comp. Bus. & Cap. Market L. 163, 181-92 (1984) (reprinting part of unofficial version). The Proposal, still an internal working document, addresses responsibilities of parent companies, protections for minority shareholders, and protections for creditors of subsidiaries. Due to disagreements concerning its subject matter, it may not be formally adopted as a directive in the near future.

For an excellent discussion of relevant directives as they stood in 1980, see Pierce, *The Regulation of the Issuance and Trading of Securities in the United States and the European Economic Community: A Comparison*, 3 J. Comp. Corp. L. & Sec. Reg. 129 (1981).

[82] First Council Directive of March 9, 1968, 11 O.J. Eur. Comm. (No. L 65) 8 (1968), 1 Common Mkt. Rep. (CCH) ¶ 1351 (1986) [hereinafter cited as First Directive].

[83] *Id.* § I.

[84] *Id.* § II.

[85] *Id.* § III.

[86] *Id.* at art. 1.

[87] *Id.* at arts. 2(1)(a)–(k).

[88] *Id.* at arts. 3(1)–(6).

[89] *See* Nieuwdorp, *supra* note 46, at 425. The 12 EEC countries include West Germany, Belgium, France, Italy, Luxembourg, Netherlands, United Kingdom, Ireland, Denmark, Greece, Spain, and Portugal. Treaty of Rome, *supra* note 43; *see also infra* note 91 and accompanying text.

[90] Nieuwdorp, *supra* note 46, at 425.

[91] The transition period allows Spain to delay compliance with the EEC requirements relating to foreign securities and direct investments until December 31, 1988. The transition period allows Portugal to delay implementing the EEC provisions relating to domestic securities transactions until December 31, 1990 and EEC provisions relating to outbound flow of capital until December 31, 1992. *See* Treaty Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and the Act Concerning the Conditions of Accession June 12, 1985, 28 O.J. Eur. Comm. (No. L 302) 1 (1985), 3 Common Mkt. Rep. (CCH) ¶¶ 7703, 7708, 7711L, 7711N, 7721P, 7721U.

[92] *See* Nieuwdorp, *supra* note 46, at 425.

[93] *Id.* at 425–26.

[94] *Id.* at 426.

[95] *Id.*

[96] *Id.*

[97] 11 O.J. Eur. Comm. (No. L 66) 21 (1979), *amended* by 25 O.J. Eur. Comm. (No. L 62) 22 (1982), 1 Common Mkt. Rep. (CCH) ¶ 1721 [hereinafter cited as Listing Directive].

[98] 25 O.J. Eur. Comm. (No. L 62) 22, 26–32) (1982), 1 Common Mkt. Rep. (CCH) at ¶¶ 1722–1722C.

[99] *Compare* Listing Directive, *supra* note 97, at arts. 1–4 (Schedules A & B), *with* SEC Form S-1, 2 Fed. Sec. L. Rep. (CCH) ¶ 7121.

[100] *Compare* Listing Directive, *supra* note 97, at arts. 1–3, 5, *with* SEC Forms 10-K and 20-F, 4 Fed. Sec. L. Rep. (CCH) ¶¶ 31,101, 19,701.

[101] Listing Directive, *supra* note 97, at art. 9.

[102] *Id.* at arts. 10–14.

[103] *Id.* at art. 17.

[104] *Id.* at arts. 18–21.

[105] Council Directive of March 17, 1980, Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admission of Securities to Official Stock Exchange Listing, 23 O.J. Eur. Comm. (No. L 100) 1 (1980); *amended* by 25 O.J. Eur. Comm. (No. L 62) 22 (1982), 1 Common Mkt. Rep. (CCH) ¶ 1731 [hereinafter cited as Information Directive] (directive does not apply to open-ended investment companies).

[106] *See, e.g.*, Pozen, *supra* note 63.

[107] *See, e.g.*, Pozen, *supra* note 63, at 397 (Appendix XIV-A, prepared by D. Hawes, provides an item-by-item comparison of the Information Directive and Form 20-F).

[108] Council Directive of February 15, 1982, 25 O.J. Eur. Comm. (No. L 48) 26 (1982), 1 Common Mkt. Rep. (CCH) ¶ 1741 [hereinafter cited as Feb. 15 Directive].

[109] *Id.* at art. 5.

[110] *Id.* at art. 7.

[111] *See* Pozen, *supra* note 63, at 392, 394.

[112] Fourth Council Directive of July 25, 1978, 21 O.J. Eur. Comm. (No. L 222) 11 (1978), 1 Common Mkt. Rep. (CCH) ¶ 1371 [hereinafter cited as Fourth Directive].

[113] *Id.* at arts. 1, 47.

[114] *Id.* at arts. 3–30.

[115] *Id.* at arts. 31–42.

[116] *Id.* at arts. 43–45.

[117] *Id.* at art. 46.

[118] *Id.* at art. 51.

[119] *See* Nieuwdorp, *supra* note 46, at 427.

[120] *Id.*

[121] *Id.*

[122] *See* Bloomenthal, *supra* note 15, at 85–87.

[123] Nieuwdorp, *supra* note 46, at 427; *see also supra* note 91.

[124] Nieuwdorp, *supra* note 46, at 427.

[125] *See* Proposal for a Council Directive Concerning the Annual Accounts of Banks and Other Financial Institutions, 24 O.J. Eur. Comm. (No. C 130) 1 (1981), *amended proposal* at 27 O.J. Eur. Comm. (No. C 83) 6 (1984), 1 Common Mkt. Rep. (CCH) ¶ 1394.

[126] Seventh Council Directive of June 13, 1983, 26 O.J. Eur. Comm. (No. L 193) 1 (1983), 1 Common Mkt. Rep. (CCH) ¶ 1421 [hereinafter cited as Seventh Directive].

[127] Eighth Council Directive of April 10, 1984, 27 O.J. Eur. Comm. (No. L 126) 20 (1984), 1 Common Mkt. Rep. (CCH) ¶ 1431 [hereinafter cited as Eighth Directive].

[128] Seventh Directive, *supra* note 126, at arts. 5–9, 11, 13–15. *But see id.* at arts. 10, 12 (excluded information required for reports to employees or to judicial authority under art. 10; in addition, member states may remove exemptions under art. 12).

[129] *Id.* at art. 1.

[130] *Id.* at arts. 1–2.

[131] *Id.* at art. 3.

[132] *Id.* at arts. 16–36.

[133] *Id.* at art. 37.

[134] *Id.* at art. 38.

[135] *See* Int'l Prac. Notebook, Apr. 1984, at 6; *see also* CCH Explanation of Seventh Directive, 1 Common Mkt. Rep. (CCH) ¶ 1425.

[136] *See* Nieuwdorp, *supra* note 46, at 429.

[137] Seventh Directive, *supra* note 126, at art. 49.

[138] *See* Nieuwdorp, *supra* note 46, at 429.

[139] *Id.*

[140] Eighth Directive, *supra* note 127, at art. 4.

[141] *Id.* at arts. 8–13.

[142] *Id.* at arts. 5–7.

[143] *Id.* at art. 14.

[144] *See* Bloomenthal, *supra* note 15, at 84.

[145] *See id.* at 83, 85.

[146] Letter from the Amsterdam Stock Exchange (Vereniging voor de Effectenhandel) to George A. Fitzsimmons, Secretary of the SEC 2 (Apr. 5, 1982) (available in SEC Comment File S7–915).

[147] Amended Proposal for a Fifth Directive Concerning the Structure of Public Limited Companies and the Powers and Obligations of Their Organs, 26 O.J. Eur. Comm. (No. C 240) 2 (1983), 1 Common Mkt. Rep. (CCH) ¶ 1401 [hereinafter cited as Proposed Fifth Directive].

[148] Amendment to the Proposal for a Council Directive on Procedures for Informing and Consulting Employees, 26 O.J. Eur. Comm. (No. C 217) 3 (1983) [hereinafter cited as Vredeling Proposal].

[149] Proposed Fifth Directive, *supra* note 147.
[150] *Id.* at arts. 4–4I, 21F–J.
[151] *Id.* at art. 21E.
[152] *Id.* at arts. 48–62.
[153] Vredeling Proposal, *supra* note 148, at art. 3.
[154] *Id.* at art. 4D.
[155] *Id.*
[156] SEC Release No. 34–14,128, *supra* note 61.
[157] *See* Bloomenthal, *International Capital Markets*, in Securities Regulation 112 (H. Bloomenthal ed., rev. ed. 1984).
[158] SEC Release No. 16,371, 44 Fed. Reg. 70,132 (1979).
[159] *See, e.g.*, Pozen, *supra* note 62, at 84–85.
[160] SEC Release No. 34–16,371, *supra* note 158; *see also* Pozen, *supra* note 62, at 85–86.
[161] SEC Release No. 33–6437, *supra* note 10.
[162] *Id.*; SEC Form 20-F, 4 Fed. Sec. L. Rep. (CCH) ¶¶ 29,701, 29,721.
[163] SEC Form 20-F, *supra* note 162; *see also* Rowe, *supra* note 3, at 134.
[164] *See* Rowe, *supra* note 3, at 134.
[165] *See id.; see also* SEC Form 20-F, *supra* note 162.
[166] *See* Rowe, *supra* note 3, at 136.
[167] *Id.; see also* SEC Form 20-F, *supra* note 162.
[168] *See* Rowe, *supra* note 3, at 136.
[169] *See, e.g., id.* at 135–37; *see also supra* text accompanying notes 160–64. *But see* Greene & Ram, *supra* note 8, at 8.
[170] SEC Release No. 33–6437, *supra* note 10.
[171] SEC Forms F-1, F-2, and F-3, 2 Fed. Sec. L. Rep. (CCH) ¶¶ 6951, 6961, 6971. SEC Form F-4 is available in business combination transactions to foreign issuers eligible to use Form 20-F; however, it is not relevant to the present discussion. *See* SEC Release No. 33–6579, 50 Fed. Reg. 19,010 (1985) (SEC Form F-4).
[172] *See* Rowe, *supra* note 3, at 133.
[173] *Id.* at 137; *see also* SEC Form F-2, 2 Fed. Sec. L. Rep. (CCH) ¶ 6961.
[174] *See* Rowe, *supra* note 3, at 140; *see also* SEC Form F-3, 2 Fed. Sec. L. Rep. (CCH) ¶ 6971.
[175] *See* Greene & Ram, *supra* note 8, at 6.
[176] *Id.* at 4, 8.
[177] *See, e.g.*, NYSE Letter, *supra* note 2, at 11.
[178] *See* The BOC Group Letter, *supra* note 57, at 3.
[179] *See, e.g.*, NYSE Letter, *supra* note 2, at 13, 15.
[180] *See* Goldman, Sachs Letter, *supra* note 59, at 3.
[181] *See* Information Directive, *supra* note 105; *see also* NYSE Letter, *supra* note 2, at 14.
[182] SEC Release No. 33–6433, 47 Fed. Reg. 50,292 (1982).
[183] *Id.; see also* Greene & Ram, *supra* note 8, at 12. The average monthly volume for the first half of 1983 on NASDAQ was approximately three-fourths of the New York Stock Exchange and almost seven times that of the American Stock Exchange. *See* SEC Release No. 33–6493, *supra* note 72, at 46,737 n.4.
[184] SEC Release No. 33–6493, *supra* note 72; *see also* SEC Comment File No. S7–951.
[185] SEC Release No. 33–6493, *supra* note 72; *see also* Letter from Mark B. Gersten, M.D., to George A. Fitzsimmons, Secretary of the SEC (Mar. 7, 1983) (available in SEC Comment File S7–951) (discussing proposed foreign issuer requirements for companies quoted on NASDAQ).
[186] SEC Release No. 33–6493, *supra* note 72; *see also* NASD Letter, *supra* note 55.
[187] *See* SEC Release No. 33–6493, *supra* note 72; *see also* Letter from the Section of Corporation, Banking and Business Law of the American Bar Association to the SEC (Mar. 31,

1983) (available in SEC Comment File S7-951) (discussing proposed foreign issuer requirements for companies quoted on NASDAQ); NASD Letter, *supra* note 55.

[188] *E.g.*, NASD Letter, *supra* note 55. An examination of the material reported under the information-supplying exemption, however, reveals an uneven quality of data voluntarily supplied to the SEC. *Compare* FIAT, S.p.A.(Italy), SEC File No. 82–116 (the annual report, consolidated financial statements with notes and balance sheets, and independent auditors' report prepared by Arthur Andersen & Co. s.a.s., published in June of 1984 were on file), *with* Carreras, Ltd. (formerly Rothmans Int'l, plc) (U.K.), SEC File No. 82–84 (interim report of 1983 for Carreras, and annual report and accounts of 1983 for Rothmans were on file).

[189] SEC Release No. 33–6493, *supra* note 72; Securities Exchange Act Regulation, 17 C.F.R. § 240.12(g)(3)–2(d)(3) (1985).

[190] SEC Release No. 33–6493, *supra* note 72. It should be noted that the SEC's action occurred after NASDAQ's rules for authorized foreign securities were heightened to require annual disclosure of certified balance sheets and statements of operations, as well as prompt disclosure of information material to investor decision-making. *See* NASD By-laws, Schedule D-II, § C(2)(a), (3)(c), NASD Manual (CCH) ¶ 1754. Such self-regulation would seem to diminish the need for the SEC's actions in relation to NASDAQ quotation.

[191] SEC Release No. 34–20,265, 48 Fed. Reg. 46,674 (1983).

[192] SEC Release No. 33–6568, *supra* note 75.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *E.g.*, Fiat, S.p.A. (Italy), SEC File No. 82–116, *supra* note 188.

[201] *See supra* notes 77–81 and accompanying text.

[202] The SEC would thus initially have to rely on the foreign issuer's statement. This, however, is not an unusual occurrence. *Cf.* Securities Exchange Act Regulation, 17 C.F.R. 240.12(g)(3)–2(b) (allowing the foreign issuer to disclose only the information required by the issuer's home state or information already disclosed).

[203] Securities Exchange Act of 1934, Rule 10(b)–5, 17 C.F.R. §240.10(b)–5 (1985).

[204] *See, e.g.*, Donnelly, *The Perils of Multimarket Offerings*, Institutional Investor, Oct. 1984, at 7 (discussing some problems with multinational offerings).

[205] *See supra* notes 21–26 and accompanying text.